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NO. 57420-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge
The Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENTS IN REPLY 1

1. THE COURT VIOLATED HEDDRICK'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT CONDUCTING A COMPETENCY HEARING. 1

2. THE COURT VIOLATED HEDDRICK'S RIGHT TO ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING. 11

3. THE COURT VIOLATED HEDDRICK'S RIGHT TO A JURY TRIAL BY ALLOWING OFFICER BRADEN TO GIVE AN IMPROPER OPINION REGARDING HEDDRICK'S VERACITY AND GUILT 14

4. THE STATE COMMITTED MISCONDUCT WHEN IT ARGUED THE JURY, IN ORDER TO BELIEVE HEDDRICK'S TESTIMONY, MUST CONCLUDE THE STATE'S WITNESSES LIED. 16

5. THE COURT MAY NOT ORDER HEDDRICK TO SUBMIT TO MEDICATION WITHOUT FOLLOWING CORRECT PROCEDURE. 19

B. CONCLUSION 22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Burg v. City of Seattle,
32 Wn. App. 286, 647 P.2d 517 (1982) 12

City of Seattle v. Heatley,
70 Wn. App. 573, 854 P.2d 658 (1993) 14

In re Detention of Schuoler,
106 Wn.2d 500, 723 P.2d 1103 (1986) 21

State v. Adams,
77 Wn. App. 50, 888 P.2d 1207 (1995) 20

State v. Barrow,
60 Wn. App. 869, 809 P.2d 209 (1991) 17

State v. Boast,
87 Wn.2d 447, 553 P.2d 1322 (1976) 16

State v. Brooks,
16 Wn. App. 535, 557 P.2d 362 (1977) 9

State v. Easter,
130 Wn.2d 228, 922 P.2d 1285 (1996) 15

State v. Eldridge,
17 Wn. App. 270, 562 P.2d 276 (1977) 12

State v. Fleming,
83 Wn. App. 209, 921 P.2d 1076 (1996) 17, 19

State v. Guloy,
104 Wn.2d 412, 705 P.2d 1182 (1985) 15

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Harris,
122 Wn. App. 498, 94 P.3d 379 (2004) 8

State v. Hernandez-Ramirez,
129 Wn. App. 504, 119 P.3d 880 (2005) 20, 21

State v. Higa,
38 Wn. App. 522, 685 P.2d 1117 (1984) 8

State v. Israel,
19 Wn. App. 773, 577 P.2d 631 (1978) 9

State v. Jones,
111 Wn.2d 239, 759 P.2d 1183 (1988) 3

State v. Lord,
117 Wn.2d 829, 822 P.2d 177 (1991) 8

State v. Marshall,
144 Wn.2d 266, 27 P.3d 192 (2001) 8

State v. O'Neal,
23 Wn. App. 899, 600 P.2d 570 (1979) 2

State v. Padilla,
69 Wn. App. 295, 846 P.2d 564 (1993) 19

State v. Rivers,
96 Wn. App. 672, 981 P.2d 16 (1999) 18

State v. Scott,
110 Wn.2d 682, 757 P.2d 492 (1988) 15

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Stevens,
58 Wn. App. 478, 794 P.2d 38 (1990) 16

State v. Swain,
93 Wn. App. 1, 968 P.2d 412 (1998) 7

State v. Wright,
76 Wn. App. 811, 888 P.2d 1214 (1995),
overruled on other grounds,
State v. Aten,
130 Wn.2d 640, 927 P.2d 210 (1996) 17, 18

State v. WWJ Corp.,
138 Wn.2d 595, 980 P.2d 1257 (1999) 14

FEDERAL CASES

Chavez v. United States,
656 F.2d 512 (9th Cir.1981) 5

Cooper v. Oklahoma,
517 U.S. 348, 116 S. Ct. 1373 (1996) 13

Drope v. Missouri,
420 U.S. 162, 95 S. Ct. 896,
43 L. Ed.2d 103 (1975) 6

Lokos v. Capps,
625 F.2d 1258 (5th Cir. 1980) 12

Miles v. Stainer,
108 F.3d 1109 (9th Cir. 1997) 6

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Moore v. United States,
464 F.2d 663 (9th Cir.1972) 5

Moran v. Godinez,
972 F.2d 263 (9th Cir.1992),
overruled on other grounds,
509 U.S. 389, 113 S. Ct. 2680,
125 L. Ed.2d 321 (1993) 7

Odle v. Woodford,
238 F.3d 1084 (9th Cir. 2001) 7, 8

Pate v. Robinson,
383 U.S. 375, 85 S. Ct. 836,
15 L. Ed.2d 815 (1966) 2, 8

Riggins v. Nevada,
504 U.S. 127, 112 S. Ct. 1810,
118 L. Ed.2d 479 (1992) 20

Sell v. United States,
539 U.S. 166, 123 S. Ct. 2174,
156 L. Ed.2d 197 (2003) 20

United States v. David,
511 F.2d 355 (D.C. Cir. 1975) 10

United States v. Makris,
535 F.2d 899 (5th Cir. 1976) 11

Washington v. Harper,
494 U.S. 210, 110 S. Ct. 1028,
108 L. Ed.2d 178 (1990) 20

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS

CrR 3.3(e)(1) 3

RAP 2.5(3) 16

RAP 2.5(a)(3) 14-16

RCW 10.77.060 ..... 1, 3, 4, 9, 11

RCW 10.77.060(1) 3, 11

RCW 10.77.060(1)(a) 3, 11

RCW 71.05.217(7) 21

RCW 71.05.217(7)(a) 20, 21

RCW 9.94A.505(9) 19

U.S. Const. amend. 14 20

A. ARGUMENTS IN REPLY

1. THE COURT VIOLATED HEDDRICK'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT CONDUCTING A COMPETENCY HEARING.

The state argues an evidentiary hearing was unnecessary because Judge Kessler never made a threshold determination that there was reason to doubt competency, and that "competency was never at issue in the instant case." Brief of Respondent (BOR) at 1, 6, 16, 22. This contention amounts to ignoring the elephant in the room. Judge Kessler entered a written pre-trial order that unequivocally states there was reason to doubt Heddrick's competency. CP 4-7. This order, printed on the state's own form, spells out the need for an evaluation to address the competency issue in detail:

> The report of the evaluation shall include the following pursuant to RCW 10.77.060:
> C(1). A description of the nature of the examination;
> C(2). A diagnosis of the defendant's mental condition;
> C(3). COMPETENCY: an opinion as to the defendant's capacity to understand the Proceedings and to assist in defendant's own defense; If the report concludes the defendant is incompetent to proceed, an opinion whether psychotropic medications are necessary to restore the defendant's competency;

CP 6.

The order further states "[t]his action is stayed during this examination period and until this court enters an order finding the defendant competent to proceed." CP 7.

In Pate v. Robinson, the Illinois competency statute at issue directed the trial court to hold a competency hearing on its own motion whenever there was a "bona fide reason" to doubt competency. Pate v. Robinson, 383 U.S. 375, 378, 85 S. Ct. 836, 15 L. Ed.2d 815 (1966). The United States Supreme Court held the trial court's failure to hold such a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. Heddrick's case is different in one important respect. Unlike the judge in Pate, Judge Kessler made a threshold determination that there was reason to doubt Heddrick's competency. CP 4-7. This is not a case, then, where Heddrick on appeal must demonstrate there was a reason to doubt competency in order to show the trial court erred in not conducting an evidentiary hearing. State v. O'Neal, 23 Wn. App. 899, 600 P.2d 570 (1979), cited by the state, is distinguishable on precisely this ground. BOR at 16-18. O'Neal held an evidentiary hearing on the competency issue was not required because the judge never determined there was a reason to doubt competency. Id., 23 Wn. App. at 902.

The state attempts to bypass the due process requirement of an evidentiary hearing by arguing the plain language of Judge Kessler's written order does not mean what it says. BOR at 16, 18. The state offers no authority for the proposition that the unambiguous meaning of a trial court's written order should be disregarded on appeal.

Once Heddrick's competency proceedings were set in motion, Judge Kessler appropriately tolled the trial period until the court was satisfied that he was competent. CP 7; CrR 3.3(e)(1). An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines the defendant is competent to stand trial. CrR 3.3(e)(1). Tolling is necessary because neither side can go forward with trial preparation until the defendant is found competent to proceed. State v. Jones, 111 Wn.2d 239, 245, 759 P.2d 1183 (1988). If, as the state contends, Judge Kessler never found reason to doubt competency, then Heddrick's trial would not have been tolled until Judge Yu entered an order finding Heddrick competent to stand trial. See id. ("When the trial court determines that there is reason to doubt the defendant's competency pursuant to RCW 10.77.060(1), the proceedings are placed in limbo").

Despite the plain language of Judge Kessler's written order, the state argues Judge Kessler never made a threshold determination to doubt

competency in the assault case because it was based on Judge Yu's order in the harassment case. According to the state, Judge Yu's order did not constitute a determination of reason to doubt competency either.[1] BOR at 16, 18. But Judge Yu, having the full record of Heddrick's past history before her, specified there was reason to doubt competency in the harassment case and described the need for an evaluation pursuant to RCW 10.77.060. 2CP 38-41, 13RP.[2] Judge Kessler's determination was well-founded, especially in light of the fact that prosecutor Jennifer Miller, who was also the prosecutor in the harassment case, joined defense counsel in requesting a competency evaluation in this case.[3] 1RP 3-7.

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[1] Judge Kessler stated: "If a court has raised a doubt as to competency, I think I have no choice but to raise that same doubt." 1RP 6.

[2] The state's brief in response designates the entire verbatim report of proceedings (VRP) record from the harassment case (COA No. 57469-8-I). BOR at 7 n.3. Heddrick's opening brief designation of the verbatim report of proceedings did not include the entire VRP record in the harassment case. For the sake of consistency, the designation in this brief includes the entire VRP record from the harassment case as follows: 7RP- 9/8/04, 10/14/04, 1/20/05; 8RP - 7/14/05; 9RP - two consecutively paginated volumes from 7/18/05; 10RP - two consecutively paginated volumes from 7/19/05; 11RP - 7/20/05; 12RP - 7/21/05; 13RP - 7/27/05; 14RP - 8/29/05; 15RP - 9/26/05 and 11/23/05; 16RP - two consecutively paginated volumes from 10/10/05; 17RP- 10/11/05; 18RP - 10/12/05. An amended opening brief using the updated designation will be filed as well.

[3] Heddrick's opening brief in the instant case inadvertently misstated several facts in the harassment case. App. Opening Brief at 9, 10, 11. Specifically, Judge Dean Lum, not Judge Yu, initially found reason to doubt competency on September 8, 2004. 2CP 92; 7RP 3-10. Judge Trickey, not Judge Yu, entered an order finding Heddrick incompetent on

Indeed, the state in its brief tellingly ignores Heddrick's pronounced history of psychotic behavior, suggesting by omission that Heddrick's prior determination of incompetency and his history of schizophrenic delusions had no bearing on the issue of whether Judge Yu should have held an evidentiary hearing before proceeding to trial. Both Dr. White and Dr. Marquez agreed Heddrick's severe mental problems, while variable in intensity, were persistent. Both recognized his condition fluctuated, as did the prosecutor and defense counsel. 2CP 125-27, 132-33; 1RP 6; 13RP 5. Heddrick's demonstrated history of incompetence, coupled with more recent evidence of decompensation, was enough to give Judge Yu and Judge Kessler reason to doubt Heddrick's competency as of July 2005. See Moore v. United States, 464 F.2d 663, 665-66 (9th Cir.1972) (records showing defendant's history of mental illness and instability raised doubt as to competency even though current psychiatric report found him competent); Chavez v. United States, 656 F.2d 512, 518 (9th Cir.1981) (hearing required when there is psychiatric evidence of past

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October 14, 2004. 2CP 94-96; 7RP 11-17. Judge Yu did not express an unequivocal doubt regarding competency until July 27, 2005. 2CP 38-41; 13RP 19-20. The state is correct to point out these errors (BOR at 19, 20 n. 12), but they do not affect the substance of Heddrick's argument on appeal. If anything, the fact that four judges, rather than two, expressed doubts about Heddrick's competency reinforces the argument that an evidentiary hearing was required to determine competency.

incompetence and more recent evidence indicating that such incompetence may have recurred).

Significantly, Heddrick had earlier been restored to competency only after being forcibly medicated. 2CP 132, 134, 13RP 6. Equally significant, Heddrick was adamant he would not voluntarily take any medication, and White had earlier reported Heddrick's mental health problems could worsen if he were found competent and incarcerated without medical treatment. 2CP 120, 126, 127. Yet prior to proceeding to trial, there is no indication Judge Yu inquired whether Heddrick received any medication between the time of Judge Trickey's competency finding in January 2005 and the start of trial some ten months later, during which period Heddrick remained incarcerated. See Drope v. Missouri, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed.2d 103 (1975) ("a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial"). In Miles v. Stainer, the Ninth Circuit held the trial court generally erred in not holding a competency hearing and specifically erred in failing to inquire whether the defendant was taking his medication despite the strong warnings in the court file suggesting the need to ask the question. Miles v. Stainer, 108 F.3d 1109, 1112-13 (9th Cir. 1997); see also Moran v. Godinez, 972 F.2d 263, 265 (9th Cir.1992) (court's failure to inquire about

the four psychiatric medications defendant was taking raised doubt about competence on appeal), overruled on other grounds, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed.2d 321 (1993). The same situation presented itself to the trial court here. Indeed, Judge Yu did not ask Heddrick a single question from the point where she ordered a competency evaluation on August 1, 2005 to the time Heddrick proceeded to trial in October 2005.

In support of its position that the court observed adequate procedural safeguards, the state relies on Heddrick's trial lawyer ultimately declining to contest competence. BOR at 19, 22-23. Although considerable weight should be given to an attorney's opinion regarding a client's competency, a lawyer's opinion alone cannot be determinative of the issue. State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998). Indeed, "counsel is not a trained mental health professional, and [her] failure to raise petitioner's competence does not establish that petitioner was competent. Nor, of course, does it mean that petitioner waived his right to a competency hearing." Odle v. Woodford, 238 F.3d 1084, 1088-89 (9th Cir. 2001) (trial court erred in not conducting evidentiary hearing even though no one questioned defendant's competence over the course of two years of pre-trial proceedings and twenty-eight days of trial). For these reasons, failure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's

competency. Id. A reason to doubt competency does not magically disappear because defense counsel no longer contests the issue.

The state cites State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) for the proposition that a court may proceed without an evidentiary hearing based on counsel's representation that the defendant is competent. BOR at 16. Harris stands for no such proposition. The court in Harris merely observed that the trial court is not required to hold a hearing on the record *before* ordering a competency evaluation. Id. By way of contrast, the issue here is that the trial court was required to hold an evidentiary hearing *after* it found reason to doubt competency.

The state cites State v. Higa, 38 Wn. App. 522, 525, 685 P.2d 1117 (1984) in support of its argument that an evidentiary hearing was not needed because neither party contested Judge Trickey's previous order of competency entered on January 20, 2005. BOR at 8 n.4. To the extent, if any, Higa holds that a defendant waives his right to an evidentiary hearing by failing to request one after the court finds reason to doubt competency, such a holding is no longer good law because it cannot be reconciled with the now established rule that a hearing is constitutionally required in that circumstance. Pate, 383 U.S. at 385-86; Odle, 238 F.3d at 1087; State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); State v. Israel, 19 Wn. App. 773,

776, 577 P.2d 631 (1978). To the extent, if any, Higa holds the trial court has *discretion* to hold an evidentiary hearing after finding a reason to doubt competency, such a holding is no longer good law for the same reason. Id. Assuming the discretionary standard were appropriate, Judge Yu would have abused her discretion in declining to hold an evidentiary hearing under the circumstances of this case. See, e.g., Israel, 19 Wn. App. at 776-78 (although no written expert report provided, due process satisfied because trial court held evidentiary hearing to determine competency after finding reason to doubt competency); State v. Brooks, 16 Wn. App. 535, 538, 557 P.2d 362 (1977) (trial court did not err in failing to comply with competency procedures of RCW 10.77.060 requiring two appointed experts; there was "substantial compliance with the purpose and intent of the statute because defendant received a full competency hearing").

The state, in arguing there was no basis to seek an evidentiary hearing, attaches significance to Dr. White's opinion, orally conveyed by Tracy Lapps during the October 6, 2005 telephone conference, that Heddrick was competent. BOR at 22. White's opinion, even if taken at face value, is virtually worthless. First, White evaluated Heddrick for the harassment case. The state concedes Heddrick's competency was not evaluated for the instant case, and there is no indication that White's

evaluation addressed whether Heddrick could assist his attorney, Marcus Naylor, in this case. BOR at 14 n.9. Second, a barebones oral conclusion that Heddrick was competent offered up as second-hand hearsay by Lapps, Heddrick's attorney in the harassment case, cannot meaningfully substitute for an evidentiary hearing on the matter in the assault case. The court had no evidence before it as to how White derived his ultimate opinion. 17RP 14-15. Lapps merely relayed the gist of White's oral conclusion to Judge Yu. There was no description of the nature of the examination or the methodology used by White to formulate his purported conclusion. There was no diagnosis of Heddrick's mental condition, past or present, and no explanation as to why White changed his mind regarding competency. Without this vital information, the trial court had no way of determining whether White's opinion was sound.

Even if White's naked conclusion of competency retained any probative value for the assault case, "[i]t is the duty of the trial court to make a specific judicial determination of competence to stand trial, rather than accept psychiatric advice as determinative on this issue." United States v. David, 511 F.2d 355, 360 n.9 (D.C. Cir. 1975). "In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions . . . are credited, the judge must still independently decide if the particular defendant was legally capable of

reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him." United States v. Makris, 535 F.2d 899, 908 (5th Cir. 1976). By accepting, without further scrutiny, defense counsel's oral representation that Dr. White said Heddrick was competent, the court abandoned its ongoing duty to make an informed and independent decision regarding Heddrick's competency.

2. THE COURT VIOLATED HEDDRICK'S RIGHT TO ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING.

The state contends Judge Yu's competency finding was not a critical stage of the proceeding because Judge Yu, by signing the competency order, merely affirmed his presumed competency. BOR at 23. Judge Kessler's order, in specifying that the action is stayed until entry of an order finding the Heddrick competent to proceed, dispels any notion that he was presumed competent. CP 7. In addition, if there were never any reason to doubt Heddrick's competency, there would have been no reason to toll the proceedings pursuant to RCW 10.77.060(1)(a) and no reason for Judge Yu to enter an order ultimately finding Heddrick competent. CP 8.

The state similarly argues Judge Yu's competency finding was not a critical stage of the proceeding because the finding of competency was simply a ministerial act. BOR at 1, 24. A ministerial act derives from a

duty imposed expressly by law that is mandatory and imperative rather discretionary. Burg v. City of Seattle, 32 Wn. App. 286, 291-92, 647 P.2d 517 (1982). A determination of competency is a matter of discretion. State v. Eldridge, 17 Wn. App. 270, 279-80, 562 P.2d 276 (1977). Judge Yu's finding of competency was not a ministerial act.[4]

The state alternatively argues Heddrick was not denied counsel at a critical stage of the proceeding because he was represented by Lapps, who, according to the state, agreed to "sign off" on the competency order on behalf of Naylor. BOR at 1, 23, 25. First, Lapps made no such agreement. 16RP 4. It was the prosecutor who initially told the court Lapps was willing to "sign off" on the competency order. 16RP 3. In response, Lapps disclaimed authority to act for Naylor because Naylor worked in a different office and she did not even know if Naylor had arranged for a separate competency evaluation. 16RP 4. Lapps expressed no familiarity with Heddrick's assault case. When the court suggested Naylor be contacted to confirm his position on the competency issue, the

[4] Care should be taken to distinguish between a defendant's *substantive* due process right not be tried while incompetent, the determination of which is a matter of discretion, with a defendant's *procedural* due process right not to be found competent without adequate procedural safeguards. Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980). Heddrick's claim that the court erred when it found him competent without a competency hearing is a procedural, not substantive, due process claim. The court, having found reason to doubt competency, did not have any discretion to decline to conduct an evidentiary hearing.

prosecutor said Naylor had already agreed that the competency issue "needed to be taken care of." 16RP 4. The court then signed the competency order based on the prosecutor's representation. 16RP 4-5. Lapps did not hold herself out as Heddrick's counsel for the assault case, and the court did not treat her as such. Furthermore, the state is unable to cite any authority for the proposition that the trial court could sua sponte treat Lapps as substitute counsel for Naylor.

"For the defendant, the consequences of an erroneous determination of competence are dire" because if an incompetent lacks the ability to communicate effectively with counsel, he may be unable to exercise rights deemed essential to a fair trial or effectively make myriad smaller decisions concerning the course of his defense. Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373 (1996). Naylor, not Lapps, represented Heddrick for the assault case. Because an erroneous determination of competence threatens the basic fairness of the trial itself, Heddrick had the right to have Naylor present at this critical stage.

3. THE COURT VIOLATED HEDDRICK'S RIGHT TO A JURY TRIAL BY ALLOWING OFFICER BRADEN TO GIVE AN IMPROPER OPINION REGARDING HEDDRICK'S VERACITY AND GUILT.

The state claims Heddrick waived the issue of improper opinion testimony on appeal. BOR at 39. RAP 2.5(a)(3) provides a "manifest error affecting a constitutional right" may be raised for the first time on appeal. The state cites City of Seattle v. Heatley, 70 Wn. App. 573, 583-86, 854 P.2d 658 (1993) for the proposition that the admission of improper opinion testimony on guilt may not be raised for the first time on appeal because it is not an error of constitutional magnitude. BOR at 39. Heatley held no such thing. Rather, the court held improper opinion on guilt should not *automatically* be considered an error of constitutional magnitude without evidence that the claimed error is "manifest" within the meaning of RAP 2.5(a)(3). Heatley, 70 Wn. App. at 583, 586.

An error is "manifest" when there is "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed error to see if the argument has a likelihood of succeeding under harmless error analysis. Id. A

constitutional error is harmless only if (1) the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error; and (2) the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Although the exception carved out by RAP 2.5(a)(3) is a narrow one, an appellate court may not decline to pass on the merits of a constitutional error and thereby shortcut the review process by simply deciding the error is insufficiently "manifest." State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). In his opening brief, Heddrick makes a plausible showing that the improper opinion evidence had identifiable consequences at trial and that analysis need not be repeated here. See Opening Br. of App. at 42-43.[5]

The state also argues this Court should decline review because defense counsel objected on the basis of "hearsay" rather than improper opinion. BOR at 39-40. In support, the state cites State v. Boast for the proposition that a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. BOR at 39-40;

[5] A more comprehensive analysis of prejudice resulting from the challenged testimony presented in the confrontation clause section of the opening brief is equally applicable to the improper opinion issue. See Opening Br. Of App. at 31-36.

State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976)). That rule is inapplicable here because the admission of improper opinion testimony was an error of constitutional magnitude within the meaning of RAP 2.5(3). See State v. Stevens, 58 Wn. App. 478, 494, 794 P.2d 38 (1990) (recognizing RAP 2.5(a)(3) trumps rule enunciated in Boast). It would be perverse to allow review of an error of constitutional magnitude to which *no* objection was taken below, but deny review where defense counsel objected to an error of constitutional magnitude but happened to state an incorrect or incomplete ground for objection.

4. THE STATE COMMITTED MISCONDUCT WHEN IT ARGUED THE JURY, IN ORDER TO BELIEVE HEDDRICK'S TESTIMONY, MUST CONCLUDE THE STATE'S WITNESSES LIED.

The state concedes comments in closing argument that seek to compare the honesty of the defendant with law enforcement officers are improper. BOR at 41. The state nevertheless asserts the prosecutor did not commit misconduct because, given the diametrically opposed events presented at trial, this was a case in which at least one person was lying. BOR at 42-43. The state, by engaging in this fallacious reasoning on appeal, falls into the same trap as the prosecutors who advance the universally condemned "lying" argument at trial. "[W]here a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a

prosecutor may properly argue that, in order to believe a defendant, the jury must find that the State's witnesses are *mistaken.*" State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), overruled on other grounds, State v. Aten, 130 Wn.2d 640, 657-58, 927 P.2d 210 (1996) (emphasis added). But under no circumstance can the prosecutor argue that, in order to believe a defendant, the jury must find that the state's witnesses are *lying*. See, e.g., Id. at 826; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991). In every case where the courts have found improper argument, the testimony of the witnesses were diametrically opposed. Time and again prosecutors, faced with irreconcilable versions of events, cannot resist the temptation to argue the jury must believe the state's witnesses are lying if they were to accept the defendant's story. That is misconduct, and that is precisely what happened here. Jurors did not need to find the officers were making up facts in order to acquit Heddrick; all that they needed was to entertain a reasonable doubt regarding any one element of the state's case, and were required to acquit unless it had an abiding conviction in the truth of the officers' testimony. Wright, 76 Wn. App. at 825-26; Fleming, 83 Wn. App. at 213.

The state claims the prosecutor made its argument only to show the state's witnesses were being truthful. BOR at 43. This reasoning is no

more than sophistry when applied to Heddrick's case. The prosecutor plainly stated the jury would need to believe the officers were "making up facts" if it accepted the defendant's version of events. 4RP 72. If that is not an impermissible "lying" argument, nothing is.

The state argues the prosecutor did not commit misconduct because she only "stat[ed] the obvious" in a case where the credibility of the witnesses were a central issue. BOR at 43. This Court has soundly rejected that very claim. In Wright, this Court held a prosecutor may properly argue the jury must find the state's witnesses are *mistaken* in order to believe defendant is proper because "such an argument does no more than *state the obvious* and is based on permissible inferences from the evidence." Wright, 76 Wn. App. at 826 (emphasis added). "It is misconduct, however, for a prosecutor to argue that, in order to believe a defendant, a jury must find that the State's witnesses are *lying*." Id. (emphasis added)

The state claims Heddrick cannot show prejudice. BOR at 44. "The state's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999). Ten years ago, this Court singled out this type of misconduct as a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial because the prohibition against such argument was already

firmly established. Fleming, 83 Wn. App. at 214. Furthermore, the risk of prejudice is acute where, as here, the defendant's case hinges on his credibility and the credibility of other witnesses. Rivers, 96 Wn. App. at 676; State v. Padilla, 69 Wn. App. 295, 301-02, 846 P.2d 564 (1993).

5. THE COURT MAY NOT ORDER HEDDRICK TO SUBMIT TO MEDICATION WITHOUT FOLLOWING CORRECT PROCEDURE.

The state properly concedes the trial court erroneously sentenced appellant to submit to mental health treatment and involuntary medication as a condition of community custody without following the statutory prerequisites of RCW 9.94A.505(9). BOR at 46. The state requests remand to enable the trial court to strike the condition or make a determination that it can "presently and lawfully comply with RCW 9.94A.505(9)." BOR at 46-47.

Assuming compliance is legally possible at this late date, ordering Heddrick to take all medications would be unlawful even if the statutory prerequisites were followed. RCW 9.94A.505(9) does not authorize the court to order an offender to submit to medication as a condition of community custody. Even assuming forced medication falls under the statutory rubric of "outpatient mental health treatment," such a condition would be unlawful unless certain constitutional requirements are met.

An individual has significant liberty and privacy interests, protected by the due process clause of the Fourteenth Amendment, in avoiding the unwanted administration of antipsychotic drugs. Sell v. United States, 539 U.S. 166, 178-79, 123 S. Ct. 2174, 156 L. Ed.2d 197 (2003); Riggins v. Nevada, 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed.2d 479 (1992); State v. Adams, 77 Wn. App. 50, 55, 888 P.2d 1207 (1995). The forced ingestion of antipsychotic drugs is also subject to First Amendment protection because of their potential impact on an individual's ability to think and communicate. Adams, 77 Wn. App. at 56; State v. Hernandez-Ramirez, 129 Wn. App. 504, 510, 119 P.3d 880 (2005).

Among other conditions, Heddrick suffers from schizophrenia. 2CP 103-09, 110-15, 116-28. Psychotropic drugs are commonly used in treating mental disorders such as schizophrenia by altering the chemical balance in the brain. Washington v. Harper, 494 U.S. 210, 214, 110 S. Ct. 1028, 108 L. Ed.2d 178 (1990). To justify the administration of antipsychotic drugs to Heddrick, the trial court must find (1) a compelling state interest that justifies overriding the patient's lack of consent to the administration of antipsychotic medications (2) that the proposed treatment is necessary and effective; and (3) that medically acceptable alternative forms of treatment are not available, have not been successful, or are not likely to be effective. RCW 71.05.217(7)(a). The state bears

the burden of proving each element justifying involuntary medication with clear, cogent, and convincing evidence. RCW 71.05.217(7)(a); In re Detention of Schuoler, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986). Antipsychotic drugs may be administered without an individual's consent only by court order after a judicial hearing. RCW 71.05.217(7); Id.; Hernandez-Ramirez, 129 Wn. App. at 510 n.1.

In the event this Court does not direct the trial court to strike this condition of community custody, then instructions on remand should specify that the trial court must follow the above procedures in deciding whether it is permissible to order Heddrick to ingest medication upon pain of further confinement.

B. CONCLUSION

For the reasons stated above and in appellant's opening brief, this Court should reverse Heddrick's conviction and remand for a new trial. In the event this court declines to reverse conviction, this Court should order the trial court to strike the challenged conditions relating to community custody.

DATED this 21st day of December, 2006.

Respectfully Submitted,

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